UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Benjamin Craig, Individually and on Behalf of All Others Similarly Situated, et al,	File No. 18-cv-0296 (MJD/KMM)
Plaintiffs,	Minneapolis, Minnesota
vs.	June 25, 2020
	2:00 p.m.
CenturyLink, Inc., et al,	DIGITAL AUDIO RECORDING TRANSCRIPT
Defendants.	

BEFORE THE HONORABLE KATE M. MENENDEZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
(TELEPHONE CONFERENCE)

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P R O C E E D I N G S

VIA TELEPHONE CONFERENCE BRIDGE

THE COURT: Okay. Sorry about that, Mr. Blatchley, but you were going to take the lead on the call and tell me who else is present from your team.

MR. BLATCHLEY: Judge, I believe we have on the line, and I might be incorrect about that, Keil Mueller from Stoll Berne team. Michael Mathai from Bernstein Litowitz, and Amanda Boitano from Bernstein Litowitz. If there's anyone else on the line, I apologize for not introducing them.

THE COURT: All right. Anybody else on the line on behalf of the plaintiff team that did not get named?

MR. DeJONG: Yes, Your Honor. It's Tim DeJong, and also I believe Lydia Anderson-Dana, from Stoll Berne in Portland.

THE COURT: Great. Thank you. Welcome to both of you. Anybody else?

MR. SNELLINGS: Yes, Your Honor. This is George Snellings from Monroe, Louisiana, and I'm going to participate briefly. This case got removed to your court. There's some concern it may come back to our court in Louisiana. That's why I'm participating on the call or just listening in.

THE COURT: Okay. And are you counsel in Louisiana or are you the judge in Louisiana?

MR. SNELLINGS: I'm counsel in Louisiana. Local counsel.

THE COURT: Okay. Okay. Thank you.

Anybody else on the line on behalf of the plaintiffs that didn't get named already?

All right. Let's pivot to the defendants. Who is lead counsel on behalf of the defendants for today's call, and if you could introduce your team.

MR. GIBBS: Thank you, Your Honor. This is Patrick Gibbs from Cooley. I expect to take the lead on today's call for the defendants. Also on the line today from the defendants I expect will be Ryan Blair, Sarah Lightdale, Bryan Koch. That's Bryan with a Y, K-o-c-h; and Chris Martin, all from Cooley. I don't know whether any of our counsel from Minneapolis are on the line or not.

MR. BOYD: Your Honor, Thomas Boyd is on the line.

THE COURT: Great. Welcome, Mr. Boyd.

Anyone else that wasn't named?

All right. I'd say we have plenty of lawyers to be getting along with, so let's go ahead and get started. We are here to talk about a discovery dispute that the parties have chosen to raise to me informally, basically related to the defendants' efforts to obtain through

discovery communications between the plaintiffs' counsel and the Minnesota Attorney General.

So first I need to make sure that I understand the sort of parameter of the dispute. I've got some questions for you, Mr. Gibbs. Is that a correct assessment of what you believe you are entitled to that has not yet been turned over?

MR. GIBBS: It is with the following caveat, Your Honor. The request we made actually was broader than that. It requested communications between plaintiffs and a broader array of governmental agencies relating to these matters. The reason this dispute is teed up to Your Honor in this particular form is because plaintiffs' counsel have represented to us that other than communications between plaintiffs' counsel and the Minnesota AG's office, there are no responsive documents to that request.

And then although the request is framed as one directed at plaintiffs, it's not actually directed at plaintiffs' counsel, obviously materials in plaintiffs' counsel's possession, custody and control would be in the possession, custody and control of the plaintiffs as well. So that's -- that's the request that has brought us here. The reason it's narrowed to what Your Honor just described is because we've been told that's all that exists that would be responsive.

THE COURT: Okay. And before I hear more about your thinking about why you think this is discoverable, Mr. Blatchley, let me make sure I understand the table that has been set. You have, in response to this discovery request, identified communications not between the individual plaintiffs but between their counsel and the Minnesota Attorney General, and those are the only documents that you believe are responsive to Discovery Request 13, but it is your position that they should not be disclosed because they are communications with counsel for the reasons you set forth in your letter. I'm not looking for a reiteration of the issues from you yet. I just want to make sure I -- or a reiteration of the rationale. I just want to make sure I understand what issue we are addressing.

MR. BLATCHLEY: Mike Blatchley. That's correct. I just wanted to clarify one point which is Mr. Gibbs I think accurately stated the state of affairs, but when Your Honor repeated it, I do want to clarify that we did a robust ESI search for everything in our clients' possession relating to those kinds of -- to that request and we've produced everything that was responsive. And Mr. Gibbs is right to say that the only dispute before Your Honor and that the only responsive documents that would otherwise exist that we have not produced concern those communications with the Minnesota Attorney General by counsel.

THE COURT: Great. Okay. Great. Thank you for that clarification. I feel like it's a pretty discrete and focused issue that we can continue to talk about today.

So I want to begin with you, Mr. Gibbs. My -- I have a very difficult time understanding how communications between plaintiffs' counsel and the Minnesota AG are relevant. I understand how the information that the Minnesota AG gathered in its own investigations might be relevant. I understand how its conclusions, which has I'm sure been amply communicated to the defendants in a variety of forms and formats, including through a lawsuit, are relevant. I can't quite wrap my mind around how communications between plaintiffs' counsel and the AG are relevant. So give me your best pitch.

MR. GIBBS: I'd be happy to, Your Honor. Thank you.

To me, I think the right way to think about this issue is to -- to keep in mind that because of the way the plaintiffs have framed their case, which is to say plaintiffs are alleging that a lawsuit filed by the Minnesota Attorney General's office and the news reporting on the filing of that lawsuit was a corrective disclosure. In other words, the filing of that lawsuit and the publication of the filing of that lawsuit revealed, at least in part, a years' long scheme at CenturyLink to defraud its

customers and thereby to defraud its shareholders.

We think that's wrong. We think that the Minnesota Attorney General's lawsuit, the complaint, the publicity around it, included a number of egregiously false statements. We think that to the extent the Minnesota AG's lawsuit had any impact on CenturyLink's stock price at all, it did so by misleading the market into believing there were some big brewing scandal when there wasn't.

And so the activities and statements of the Minnesota Attorney General's office around the investigation, the filing and the publication of that lawsuit, those are all key aspects of the plaintiffs' allegations. They have injected them into this case.

In my view, the right way to think about the Minnesota AG's office and its role in this case is to think about them as a third-party witness. They are a participant in some of the events that the plaintiffs claim are a part of their securities fraud claim. And so viewed in that light, I think it's beyond question that communications between counsel for one party and a third-party witness could be relevant to the case.

You know, if, for example, I went out and I found one or more of the plaintiffs' confidential witnesses and I interviewed them and had communications with them about the case, and that person came in and recanted their testimony

-- their statements, said nothing the plaintiffs have said was true, I don't think there's any question that the plaintiffs would be entitled to come in and ask questions about the nature of my communications with that witness. I don't think that counsel gets to have secret communications with third-party witnesses and shield them from the other side just because they used counsel to have those communications.

So, to me, the short answer is --

THE COURT: Why wouldn't that be work product? That exact example that you gave. Why isn't that work product?

MR. GIBBS: The communications themselves?

THE COURT: Yeah. If your part in this is an interview of a third-party witness --

MR. GIBBS: Yes.

THE COURT: -- if that's the analogy on which you want to rely for relevance --

MR. GIBBS: Yes.

THE COURT: -- why doesn't that create serious work product concerns?

MR. GIBBS: Well, two reasons. First of all, I want to be clear, if I interview a confidential witness or I exchange questions and answers with them by e-mail and I go and write up a memo summarizing my interactions with that

witness, my memo is certainly work product. That doesn't mean my communications with a third party are work product, among other things because I don't have control over that third party, right? So if I send an e-mail to a third-party witness that lays out my thinking about the case or asks them a series of questions, I put that out to someone who is a stranger to my client and who is a stranger to the case.

And, yeah, I know we're going to talk about common interests later, but if you set that aside for a moment, we're just talking about relevance or we're talking about whether something is just inherently work product because it involves counsel, I mean, no, I don't think my communications with a third-party witness are work product any more than I think that the plaintiffs' lawyers' interviews of witnesses, the communications they have with these third-party witnesses, with whom they have no relationship, right? If counsel for plaintiffs goes and interviews a witness or does it by e-mail, they have no control over whether that person just takes that e-mail and flips it over to me. In fact it happens sometimes, right?

So I don't think a communication with a third party, who is under no obligation to keep anything confidential at all, is work product just because it was conducted by a lawyer as opposed to an investigator.

THE COURT: Well, that's an artificial -- yeah, I

mean, that's a little bit of an artificial reason. It's not just because it was conducted by a lawyer. It's because it was conducted by a lawyer in preparation for litigation.

But, you know, we're going to put that aside. I know I'm the one who asked you the question. I was somewhat surprised to hear the path you took analogizing this to a third-party witness, but it's helpful to hear that that is your theory of relevance.

Why don't I hear from you, Mr. Blatchley, on behalf of the plaintiff about the relevance question.

MR. BLATCHLEY: Thank you, Judge. Again, Mike Blatchley for plaintiffs.

I think Your Honor kind of said exactly why we think these communications are irrelevant and I think they are laid out in the cases we cited to Your Honor. Again, I want to just respond to a couple of things that Mr. Gibbs said about the Minnesota Attorney General's role in the case.

We did not interject the Minnesota Attorney General into this case. The Minnesota Attorney General was investigating CenturyLink in the middle of our class period. The internal documents that we have now received from the company show that to be the case. We've now seen senior executives who were very well aware during the class period, when investors were not, about the questions that they were

asking the company about their billing practices. The Minnesota Attorney General, you know, appeared in this case during the corrective disclosures when they filed the complaint showing that one in five customers were quoted correctly, and the market's reactions to those facts which was, you know, to sell off the shares to CenturyLink and cause a dramatic decline in the price in their stock.

And again, just for context about who -- how this -- how the Minnesota Attorney General got interjected here, Judge Davis in the initial conferences in the consumer matter encouraged the plaintiffs' counsel to have communications and to coordinate with the Minnesota Attorney General. And so, you know, we kind of feel we're being taken advantage of here because we did follow that direction in conducting our investigation and seeking to prove our claims here.

But I think fundamentally the reason why there's just absolutely no relevance is that none of the documents or communications that we might have had with the Minnesota Attorney General are going to be in any way relevant to proving any element in this case. They are not going to be able to be used by either side at summary judgment. They are not just going to move the needle one inch to say, you know, whether the senior executive of CenturyLink knew that the decisions they made about their billing practices were

false and misleading when they -- they are not going to be able to shed any light on whether the corrective disclosures in fact revealed the information to the market and caused the stock prices to decline.

They are just not relevant to anything like that. They occurred, you know -- and I don't want to slip up on the time period -- but, you know, months and months if not a year after the events in the lawsuit took place. And I think as Your Honor rightly noted at the outset, they are just not relevant, you know, before we get to the other work product issues that Mr. Gibbs suggested might exist.

THE COURT: Okay. Mr. Gibbs, I welcome your thoughts in response to what opposing counsel just shared.

MR. GIBBS: Thank you, Your Honor. Because I was trying to set up the third-party witness point to lay the groundwork for a relevance argument and we ended up instead in a work product discussion but not before --

THE COURT: That was my fault.

MR. GIBBS: No, no, it's okay. I took it and ran with it. So -- but a couple points I'd like to make. First of all, it's hard for me to imagine how something could simultaneously be work product but not even relevant. They are two different issues, right? The fact that it's work product would not make it irrelevant. In fact, I think if it's work product, how could it not come within the

expansive definition of relevance under Rule 26, right? It must have something to do with the case if it's going to qualify as work product.

THE COURT: I'm sure you've done all kinds of work in furtherance of all kinds of litigation that wouldn't satisfy the relevance theory because it doesn't bear fruit, right? Like, it cannot be that just because a lawyer is chasing down a lead, an angle, a corner, an idea, is co-extensive with the universe of relevance.

MR. GIBBS: I think you and I look at that a little bit differently. If I go down a path and it doesn't bear fruit and turns up evidence that's inconsistent with my claim, it's relevant. I may not like it and it may be work product, but that doesn't mean it's not relevant. So let me give you an example.

Plaintiffs in their complaint have repeatedly and loudly parroted a claim that was made by the Minnesota Attorney General about CenturyLink allegedly overbilling millions of customers, which the Minnesota AG purports to have taken from CenturyLink documents.

(Audio interruption.)

MR. GIBBS: Somebody is shuffling papers on a microphone quite loud.

So plaintiffs' counsel in this case have repeated that accusation by the Minnesota Attorney General's office.

For all I know, plaintiffs' counsel and the Minnesota Attorney General's office have discussed that fact, have discussed that document, have discussed whether or not that allegation actually panned out. If the Minnesota Attorney General, for example, has said, yeah, we thought that but it turned out not to be true. We dug into it, we found that it was false. Okay. Totally hypothetical.

And again, we're only talking about relevance, so whether it's work product is a separate discussion. But those kinds of communications would be deeply relevant to my attempt to show that the Minnesota Attorney General's filing and the allegations that plaintiffs have loudly parroted in this case were not a corrective disclosure. They didn't reveal the truth. They were false.

And so if they are going to use the Minnesota Attorney General's allegations against CenturyLink to try to prove loss causation in this case, I think it's clearly relevant for me to look into what kinds of communications the Minnesota Attorney General has had about its case, about the factual assertions made in this case. I think relevance is quite clear.

THE COURT: Mr. Gibbs, have you communicated -- have you sought discovery from the Minnesota Attorney General about the truth or falsity of the conclusions in its -- in its investigation? Because you are articulating a

theory of relevance by which you could impeach the conclusions of the Minnesota AG by asking them what they might have said to other people, and you are choosing the other people to be the lawyers for the plaintiffs in this case. They might have said things to all kinds of other people about what is or isn't true about their investigation, including federal investigators, other agencies. Have you asked these questions of the Minnesota AG?

MR. GIBBS: I mean --

THE COURT: I can't really imagine that you haven't sought this discovery, right?

MR. GIBBS: Well, if the question is have we served third-party discovery on the Minnesota AG as part of this case, the answer is no, we have not yet done that. I have, you know, every time I have encountered this issue I have been encouraged by judges to seek discovery from the parties if it's available from the parties and not to bother third parties. But if the Court thinks this is more appropriately sought from the Minnesota Attorney General's office, I certainly could consider doing that.

But I -- I've never heard the availability of information from a third party to be a reason why a party should be excused from producing the same information.

THE COURT: Um-hum.

MR. GIBBS: I have typically operated from the opposite perspective.

THE COURT: Your theory is both over and under inclusive. In seeking all communications from between plaintiffs' counsel and the Minnesota Attorney General of any sort, you're certain to get things that actually don't either prove or disprove the theory of relevancy you've articulated. Flipside, you will not get all kinds of information that could prove or disprove your theory of relevance; namely, the lack of veracity of the conclusions that the Minnesota Attorney General announced. There might be all kinds of smoking gun information about that that has nothing to do with communications between plaintiffs' counsel and the AG, right?

MR. GIBBS: I would say yes, but that test has never been applied to the plaintiffs in this case. They sought mountains and received mountains of documents from us that do not ultimately bear on the truth or falsity of their allegations, and no one has ever suggested that that makes their request inherently overbroad or not relevant.

I mean, there's never a perfect fit between what I ask for and what ends up helping to prove or disprove a case and that's not the standard under Rule 26. It has to be reasonably calculated to lead to the discovery of admissible evidence, and I think I've articulated reasons why this is

calculated to lead to the discovery of admissible evidence.

It may not pan out. Sometimes discovery doesn't pan out. But I don't think that's a reason why I can't even ask for it. And I may very well seek discovery from the Minnesota Attorney General's office as well. But again, the fact that something is available from a third party has never, to my understanding, been a reason to deny discovery from a party if it is reasonably calculated to lead to the discovery of admissible evidence.

THE COURT: So an additional question that I have, it sounds like what you are articulating is relevance or imagined relevance, possible relevance, of communications from the Minnesota AG to the plaintiffs about their investigation, right? Not communications from the plaintiffs -- from the plaintiffs' counsel to the Minnesota AG, but communications from the Minnesota AG to the plaintiffs' counsel about their investigation.

MR. GIBBS: Well, yes, that's the example I've given. I also, frankly, have some concerns about communications going the other way.

THE COURT: Help me understand the relevance of communications going the other way.

MR. GIBBS: Sure. Well, to go back to my third-party witness example, let's say, for example, plaintiffs' counsel is feeding theories and arguments and

information to the Minnesota AG's office. I think that's relevant to the integrity and the nature of the Minnesota AG's investigation and complaints against CenturyLink. I would certainly use that to impeach witnesses and to make arguments about whether this thing the plaintiffs claim or the corrective disclosure is in fact that, or instead is it something else.

THE COURT: And, Mr. Gibbs, is your -- is your request for communications between plaintiffs' counsel and the Minnesota AG for after the Minnesota AG issued its investigation conclusions for during the Minnesota AG's investigation? When -- what's the timeframe as it compares to the AG's office investigation?

MR. GIBBS: I'm trying to pull up the request because I don't recall offhand what is the specific time period for the request. The request is framed as a -- it's all communications and documents reflecting communications, and the time period is from the beginning of the class period to the present. So it spans before and after.

THE COURT: Okay. All right. Mr. Blatchley, what are your thoughts about the arguments that Mr. Gibbs has made?

MR. BLATCHLEY: Your Honor, just very quickly on some of the points about relevance, Mr. Gibbs is not going to be able to prove one way or another about anything that

plaintiffs' counsel might have communicated with the Minnesota Attorney General months and months after the fact about what a particular document showed that was, you know, relied on by plaintiffs in the complaint. What they are going to do is they are going to put that document, if it's at issue at trial, before the jury. They are going to have someone who actually put that document together testify about what it actually means. They're not going to be able to call plaintiffs' counsel or the Minnesota Attorney General to say one thing or another that would move the needle one inch on about what that document means or what that allegation is.

Now, of course in our case we have now received discovery, and just so we're not mistaken about what that means, you know, we have the Internet cost of coverage fee, which is one of the disputed fees that's at issue in this case. The internal documents that we have now received from the defendants show that that number was far larger than the document that Mr. Gibbs claims the Minnesota AG incorrectly interpreted.

But again, what should be at issue in this case, and I think one of the things we need to note as well in terms of not just the relevance but the proportionality of this discovery being sought here, is that the way to prove the allegations or to, you know, disprove them as Mr. Gibbs

would have, is to actually deal with the evidence and the witnesses who have firsthand knowledge of the documents.

And again, the proportionality question I think is one that we had addressed at the pretrial conference before Your Honor. And again, it has to do with the logging protocol. I think implicit in the ESI protocol is that documents and communications like the ones we're discussing today were going to be of such limited evidentiary value that they didn't even need to be logged in the first place; and I think that, again, just speaks to the very, very kind of far-fetched relevance arguments I think you're hearing from Mr. Gibbs.

THE COURT: Now, let me push back on part of your argument. Mr. Gibbs suggests that if the Minnesota AG, you know, articulates to anyone, and here he has specifically focused on plaintiffs' counsel as a likely recipient of such admissions, that really their investigation was bunk or they found plenty of evidence that undermined it or they didn't mean it or it was all ill conceived, that that would be relevant to impeach the validity of the Minnesota Attorney General's sort of attack on the defendants.

And to my understanding that it's your position not just that the fact of the AG investigation should have been disclosed and wasn't, but that the fact of the conduct described in the AG investigation should have been disclosed

but wasn't, and the AG admitting that its investigation was flawed in some way could be impeachment material. What do you think about that argument?

MR. BLATCHLEY: Again, I think what we are talking about is certainly far-fetched and certainly not proportional. Um, I mean, Mr. Gibbs can certainly point to, as he has, you know, the settlements that they've paid in this case. I don't think that there's anything that could have been said between -- and again, without getting into the work product concerns -- between two counsel aligned in proving some of the same misconduct that would properly be put before any trier of fact concerning the validity of the allegations.

And again, what we're talking about, what we've been, the Minnesota Attorney General's complaint which was filed in July of 2017, again, doesn't have anything to do with what the Minnesota Attorney General claims counsel might have been discussing ten months later. So whatever the period of time after that might have been.

THE COURT: Okay. I will give you the last word, Mr. Gibbs.

MR. GIBBS: Thank you, Your Honor. I'm frankly a little taken aback to hear Mr. Blatchley talking about proportionality, both because they've given us no information about the volume of these communications. If

the volume is so great that it raises proportionality concerns, I would say that fact in and of itself is of interest and highly relevant. But frankly, I'm skeptical that the number of communications that we're talking about here could raise any conceivable proportionality concerns in a world where we have produced, you know, nearly a million and a half pages of documents to them.

And also I just, you know, in their letter brief and again just now, Mr. Blatchley has repeatedly suggested that he thinks it's unlikely that I'm gonna use any of these documents, these communications, either on summary judgment or at trial. I disagree with his assessment of that likelihood, but that's never been the test. There's no part of Rule 26 that asks how likely is it that the party requesting these documents is going to use these documents as evidence at summary judgment or trial. That's not the test. And if it were the test, we certainly wouldn't have produced a million and a half pages of documents to the plaintiffs in this case.

The test is whether the discovery that I'm requesting is reasonably calculated to lead to admissible evidence. And so it doesn't have to be that these communications themselves are going to be used in evidence of any particular proceeding. I'm entitled to investigate my position one step at a time by asking for pieces of

evidence and then following the trail where it leads just like Mr. Blatchley is.

And that's sort of my last point, which is plaintiffs here on all fronts, proportionality, relevance, all of it, are proposing a -- what would amount to an absolutely egregious double standard, right? They've asked for millions of pages of documents from us, the vast majority of which are never ever, ever going to see the light of day. The vast majority of which are completely irrelevant to the truth or falsity of their allegations or our defense, because that's how discovery works.

And then we make a request for what -- what could at most be, what, a couple of dozen e-mail exchanges? Maybe several dozen. It's not going to be thousands. It's not gonna be hundreds of thousands. And all of a sudden they are up in arms and claiming that it's disproportionate to the needs of case and, you know, you don't get it unless you can show definitively that you're going to put it in evidence at trial or summary judgment. You know, that's not the standard that's being applied to their request and it shouldn't be the standard that's applied to ours.

Rule 26 says I'm entitled to get discovery if my discovery is reasonably calculated to lead to the discovery of admissible evidence. I don't think there's any question that this is reasonably calculated to lead to discovery of

admissible evidence. It may pan out. It may not. That's how discovery works, but I get to take discovery, too.

THE COURT: Okay. I am going to issue a ruling right now. I'm going to explain the reasoning. I will follow it up with a brief order.

I'm going to deny the request for the information at issue. I'm not relying on work product or attorney-client privilege. I think that the issues related to that are very interesting and complicated and if I were going to rely on that I would have asked for supplemental briefing, more formal briefing, because the letter briefs and as augmented by my own research just hints at the complexity of the shared interest doctrine. Frankly, it's the way the work product doctrine works in this case and I would need more input and assistance from the parties.

Instead, I am concluding that the information being sought, and I'm going to be very specific, I'm not finding that everything asked for in that document request was necessarily irrelevant. But now that we have drilled down to the only category of communications that might exist, namely communications between plaintiffs' counsel and the Minnesota Attorney General during the class period, which postdates when the Minnesota Attorney General was conducting its investigation or issuing its findings, is not relevant to any issues in this case. And I'm going to

explain a few things.

First of all, I disagree with Mr. Gibbs' assessment that somehow the plaintiffs are not entitled to invoke questions of proportionality because the defendants have produced millions of pages. I'll remind everyone that I have denied discovery requests from the plaintiffs as well as from the defendants in this case. I'm not going to take a global view that whoever provides less paper waives the right to complain about the relevance or even the proportionality of certain requests.

Proportionality is an assessment not of the total amount of discovery being exchanged from one side or the other, but the specific burdens related to a particular request as balanced against the likelihood that that request leads to the discovery of relevant and usable evidence.

I agree very much with Mr. Gibbs that we can't just talk about discovery as though each page received has to itself be independently admissible and tieable to a particular element that's guaranteed to be at issue in summary judgment or trial. That is too narrow.

But nonetheless, when the theory for relevance here is that the Minnesota Attorney General's conclusions are flawed and wrong and that they misunderstand the billing practices of the defendants, they misapprehend the way the defendants interact with their clients and they falsely

concluded that these inappropriate billing practices happened, there are much more direct and directly relevant and useful ways to have that information to prove up that conclusion than asking for plaintiffs' counsel's after-the-fact communications with the AG.

One of the reasons that I find that this does raise proportionality concerns is because it also so clearly raises questions of work product and attorney-client privilege. And to have to log each of these communications, whether they are many or few, and assess the privilege issues related to each of them when the theory of relevance is so remote and tangential I find to be disproportionate to the discovery needs in this case.

The defendants I am certain have access to millions of pages, many of which are in their own collections, to undermine and discredit the conclusions -- or to try to undermine and discredit, I'm not opining on whether they will succeed or not -- the conclusions of the Minnesota Attorney General. Asking for after-the-fact communications between the Minnesota AG and plaintiffs' counsel about those things are not even close to a direct way to prove that up.

I also agree with Mr. Gibbs that we don't have to have admissible evidence for it to be discoverable, but I do have an incredibly difficult time picturing how

communications between the plaintiffs and the -- or the plaintiffs' counsel and the Minnesota AG could ever actually even lead to discoverable evidence, let alone having a difficult time picturing how communications from counsel could be used in an impeachment context. I understand impeachment is a big tent. I thought a lot about it back when I was a litigator. But I don't find that this is likely to lead to evidence even that leads to discoverable evidence, and I find that actually the entire theory of relevance here is much more amply and soundly proven through other methods and methodologies.

I don't accept Mr. Gibbs' suggestion that I am somehow out on a limb in crazy land by suggesting that it would be better to get information from a third party than a party to the litigation. I think that's a little bit of a simplistic comparison in this case. The third party at issue is also engaged in extensive litigation, or has been, with the defendants. There's been enormous information shared about the AG's conclusions about what the AG found, what they said, what their investigation led to.

This isn't like picking on some third party small business to get copies of their conclusions or the ways they reached them. I'm not saying I'm not wading into discoverability of those things or not. The AG is not on the phone, and I'm not trying to say that they have to turn

these things over. But I suspect very strongly that the defendants already have a great deal of information about the AG's conclusions, how it reached them, whether they were flawed, what information they looked at, what the weaknesses are in their conclusions. In fact, I suspect that's been at the heart of the work that the defendants have been doing in all three aspects of this MDL.

So I am simply finding that it is not relevant. That it's removed in time from the actual strength or weakness of the Minnesota AG's conclusions. That it's several levels removed in direct relevance, and that because it is so fraught with issues of privilege when weighed against a really theoretical remote theory of relevance, that that actually does validly raise proportionality concerns.

I don't agree that simply because the defendants have had to produce a great deal of discovery in this case that means that the plaintiffs cannot invoke proportionality concerns. Proportionality has different facets and different impacts in different ways of thinking about it. And frankly, in a case like this, it is very little surprise that the defendants would be in possession of many more of the documents that are relevant to both sides than the plaintiffs would, but that doesn't become a basis for the defendants to be entitled to discover otherwise not relevant

information.

So I'm going to deny the request to get communications between plaintiffs' counsel and the Minnesota AG's office from the class period identified, which postdates the Minnesota AG's initial conclusions in this case. I'm not going to make a decision about whether I would also deny that request on grounds of work product, shared interests, or any other privilege. I'm basing it solely on the relevance assessment at this time.

Does anybody need -- let's start with you, Mr. Blatchley. Do you need any clarification about my ruling?

MR. BLATCHLEY: No thank you.

THE COURT: Mr. Gibbs, do you need any clarification about the line that -- or the ruling that I've issued?

MR. GIBBS: No, Your Honor. The ruling is quite clear.

THE COURT: Okay. The next item that was mentioned in only one of your letters was that there might be another disagreement brewing. I get the impression that it is embryonic at this point. Mr. Blatchley, do you want to tell me about that?

MR. BLATCHLEY: We had a lengthy meet and confer on Tuesday of this week and it appears we're at an impasse

on two interrogatories that we think we're entitled to information on. And I guess we wanted to raise that, and we described it briefly in the letter, which is the term "gap closures" which is a term that we've seen being used in company documents, and as well as information we're seeking about the billing systems and how revenue is generated by various fees were reported up into the company's financial results.

I just wanted to raise the possibility of an informal conference and scheduling one with Your Honor because we do believe it is an issue that needs or should -- we respectfully request that it, you know, receive prompt attention; but we did want to also flag that we think that some additional documentary evidence concerning the items that will be at issue in the request is something that the Court needed to see in order to rule on it, so we wanted to make sure that we were proceeding in the right way in requesting an informal conference on these issues.

(Pause in audio.)

MR. GIBBS: Your Honor, this is Patrick Gibbs. If you're speaking, I can't hear you.

THE COURT: Oh, thank you. How many times am I going to make the same mistake? I trust you all have made it once or twice yourself. I was speaking into mute. Let me repeat.

I was asking you, Mr. Gibbs, what your perspective is on whether there is indeed a kind of ripe disagreement about this and how you think would make the most sense to raise it.

MR. GIBBS: We have had some amount of meet and confer, but I think Your Honor is right. It is embryonic. We may end up doing another informal discovery conference on it, but lobbing a request for an informal discovery conference into a letter relating to a conference on a different subject is not how I understood the process to work. So I, frankly, would prefer to go through the normal process of scheduling an informal discovery conference if it's necessary once we have actually completed the meet and confer process on this, because I understood this conference to be about our request for these communications. You have now ruled on it. There are ongoing discussions about these other interrogatories. I don't really know what's the purpose of lobbing it in through a letter on a totally different subject or into today's conversation.

THE COURT: Okay. Thank you.

I share Mr. Gibbs' perspective at this time. I'm not faulting Mr. Blatchley for just putting it out there as kind of an issue identifier that's going to come down the road, but it feels certainly inappropriate for me to even wade into it speculatively when Mr. Blatchley hasn't

addressed it in his -- I'm sorry, when Mr. Gibbs hasn't addressed it in his letter; and it feels like it's a little early for the issue to be crystalized.

One of the very helpful things about the conversation we just had related to the communications issue, although I'm sure Mr. Gibbs doesn't agree that it's helpful, but is that it was very well teed up by the parties. You had communicated about what was being requested. The other side had communicated about what existed. You had communicated about why you didn't intend to turn it over, why the other side thought it was discoverable, and then you brought that to me.

This feels early and we haven't yet had that kind of meeting of the minds about what the dispute is. I am widely available throughout the month of July. Basically I'm going to take a couple days off at the end of next week, but otherwise I am -- I'm really available whenever you decide that you be want to address this. If you're unable to work it out yourself, I could get you on the calendar with great haste.

Alternatively, as you know, things can be brought to me formally as well. It takes both sides to agree that the informal process is the appropriate one, and if you decide this is more appropriate for a formal motion practice, I'm open to that as well.

So, feels early to wade into this, but I am ready and happy to do so when you decide that you need my assistance in whatever form that takes.

Mr. Blatchley, anything else at this time?

MR. BLATCHLEY: Thank you for that clarification, Your Honor. We certainly did not mean to inappropriately interject an issue. We just thought that the issue was teed up and just wanted to get your guidance on the best way to proceed, so thank you for that.

THE COURT: You're welcome. Anything else that you think we should talk about while we're together? Any scheduling matters or anything else that would be helpful or should we save it for another day?

MR. BLATCHLEY: The one thing I would note, we did bring a, you know, a disputed motion over additional discovery related to our class certification motion. We were able to resolve that before that hearing. We were scheduled to argue the motion before Your Honor. That discovery has now been complete and so has the briefing on our class certification motion. I believe Judge Davis is now aware of that, and I think the parties are ready for a hearing whenever the District Court is. But I just did want to note that in case that was helpful.

THE COURT: That is helpful. Thank you for the reminder, and I actually have been meaning to commend you at

some point. I have a handful of cases that have sort of fallen apart in terms of the attorneys' ability to work together civilly to resolve issues or work together civilly at all. And this case, even though it is very hotly litigated and incredibly important and high stakes to both sides, it has plenty of lawyers in the mix and plenty of issues and a lot of strong disagreements, you continue to work together respectfully and to try to find ways to narrow those disagreements and compromise even if you don't really want to, and your handling of that discovery dispute related to the class issues really demonstrated that and it enabled us to get back on track with the rest of the briefing schedule and that was really appreciated.

I'm not saying that when you have disagreements that you can't resolve that that is a failure of professionalism. I'm not saying that at all. But I do appreciate the professional tone that you all have managed to hang onto even when you have disagreements that you bring to the Court, and I also appreciate your ongoing efforts to try to compromise even when you don't really want to.

So I just wanted to note that. It's a pleasant contrast to some of my cases I have where, frankly, the parties have a lot less they should be fighting about and yet are fighting about them a lot more and a lot more hostilely.

So with that in mind, I will certainly keep my eyes open. I would not be surprised if Judge Davis relatively soon picks a time to have that hearing. I know that he had -- well, you all know better than me -- that there was a hearing in a related part of this case just yesterday. Were any of counsel on this call also involved in that hearing?

MR. BOYD: I was a listener, Your Honor. This is Tom Boyd.

THE COURT: Okay, Mr. Boyd. I know Judge Davis has a lot on his plate with the collective sets of cases going forward in this case and I'm sure he'll get that on for a hearing soon. If you haven't heard from him in a few weeks, counsel can feel free to drop me, my chambers, an e-mail and I'll see what I can learn about whatever their approach to scheduling that matter is going to be. Okay?

Mr. Gibbs, anything else you think we ought to talk about?

MR. GIBBS: No. Thank you, Your Honor.

THE COURT: Okay. All right. Thank you all for your time. I appreciate it, and everybody take care of yourself and have a good rest of the week.

MR. BLATCHLEY: Thank you, Your Honor.

MR. GIBBS: Thank you.

THE COURT: Bye.

(Court adjourned at 2:45 p.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the digital audio recording of proceedings in the above-entitled matter, transcribed to the best of my skill and ability.

Certified by: s/Carla R. Bebault
Carla Bebault, RMR, CRR, FCRR